

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of

LERNER NEW YORK, INC. D/B/A  
NEW YORK & COMPANY,

Petitioner/Employer

and

Case No. 01-RM-142091

NEW ENGLAND JOINT BOARD LOCAL 173  
A/W RWDSU/UFCW,

Union.

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**PETITIONER/EMPLOYER'S STATEMENT IN OPPOSITION TO  
UNION'S REQUEST FOR REVIEW**

Pursuant to Section 102.67(e) of the Rules and Regulations ("R&R") of the National Labor Relations Board ("Board"), Counsel for the Petitioner/Employer ("Petitioner") respectfully submits this Statement in Opposition to the Union's January 16, 2015 Request for Review of the Regional Director's Decision and Direction of Election. Copies of this Statement in Opposition and attachments have been served on the Regional Director and Union as required by R&R Section 102.67(k), as set forth in the attached Statement of Service, also filed with the Board.

**The Union's "Appeal" Raises None Of The Grounds Upon Which  
A Request For Review May Or Should Be Granted.**

A request for review will be granted by the Board only upon one or more of the grounds specified in R&R Section 102.67(c)(1)-(4). Corresponding to the four specified grounds for review, an examination of the document filed by the Union clearly discloses that it:

- (1) Raises no substantial question of law or policy because of (i) the absence of, or (ii) a departure from officially reported Board precedent;
- (2) Fails to demonstrate, based on the testimony, exhibits or other evidence contained in the record following hearing that the Regional Director's decision on

a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the Union;

- (3) Fails to demonstrate that the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and,
- (4) Does not establish there are compelling reasons for reconsideration of an important Board rule or policy.

Most, if not all, of the arguments raised by the Union in its appeal are factual in nature, and many are outright misstatement of facts, or attempts to introduce facts at this point of the proceeding which the Union, for reasons known only to itself, chose not to attempt to introduce into the record at either of the two days of hearing previously held in this matter.

Furthermore, the Union's appeal totally fails to meet the requirements, with respect to alleged erroneous factual findings, as specified in R&R Section 102.67(d). The Union's request for review totally fails to contain the required summary of any, much less all, evidence or rulings bearing on the issues together with page citations from the transcript and summary of argument. The Union attempts, contrary to language of the rule, to raise factual issues and to allege facts not timely presented to the Regional Director or at the hearing held in this matter.

A few examples clearly demonstrate the false and unreliable basis of the factual arguments the Union is now attempting to raise to overturn the thorough and well-reasoned decision of the Regional Director.

1. The Union alleges in its appeal, pg. 2, Paragraph 3, that:

"...the Union's local number is 444 not 173. The Union brought this to the attention of the Hearing Officer but apparently, the Union was ignored. The Region's decision has the wrong number and is at odds with the CBA."

To the contrary, at the hearing held in this matter on December 10, 2014, Business Agent Melvin Drungo, who signed the Union's appeal, testified to the following under questioning by Hearing Officer Burson:

(December 10, 2014 Transcript, pg. 18, lines 10-15):

“Q ...and Mr. Drungo, the – is the correct name of the Union the one that appears on the petition in this case, the New England Joint Board, RWDSU/UFCW, Local 173? Is that the correct name of the Union?”

“A Yes.”

See also Board Ex. 3, the parties’ current labor agreement received into the record without Union objection (December 10, 2014 transcript, pg. 20, lines 1-7), the cover page of which identifies the parties as Lerner New York Inc. and “Local 173”.

2. In its appeal, pg. 2, Paragraph 8, the Union falsely claims “The Employer never served the Union with a copy of its brief which is in violation of the Board’s rules.”

This statement is absolutely false. Attached to this Statement in Opposition as Exhibit 1 is counsel for the Petitioner’s federal express Priority Overnight package air bill addressed to Melvin Drungo at the Union’s correct and current address, dated December 22, 2014, the day before service of the brief was due. Also attached, as Exhibit 2, is the federal express tracking proof of delivery of the package containing the Employer’s brief shortly after noon on December 23, 2014, the due date for service of the brief, with delivery made to the receptionist/front desk of the Union’s office, and the delivery receipt being signed for by one “T. Salter”. It is also interesting to note that at pg. 2, Paragraph 7 of its appeal, the Union refers to a statement made by counsel for the Petitioner in its brief, which brief the Union then claims in the next sentence of its appeal that it never received.

3. In its appeal, pg. 2, Paragraph 2, the Union states the Employer did not appear on the first day of the hearing and the Petition should have been dismissed.

In fact, counsel for the Employer spoke personally with Business Representative Drungo by telephone on December 9, 2014, before the first day of hearing scheduled in this matter, informing him that the Union’s eleventh hour rejection of a stipulation previously signed by counsel for the Petitioner (located in Wisconsin, not Boston) would result in a request for a continuance of the hearing, which request was made by counsel for the Petitioner prior to the

commencement of the December 10, 2014 hearing, and granted by the Hearing Officer.

December 10, 2014 transcript, pg. 26, lines 4-22. The continued hearing reconvened on Tuesday, December 16, 2014, with all parties present along with their representatives, and the record was completed.

4. The Union, at pg. 2, Paragraph 7 of its appeal, complains that it was not represented by an attorney at either of the days of hearing held in this matter, but both the Employer "and the NLRB" were, which the Union complains placed it "in a position of disadvantage".

Obviously, neither the NLRB nor the Petitioner/Employer were in a position to influence the decision of the Union to be represented by an attorney or not at the hearings held in this matter. The Union's suggestion that the Board should set aside the Regional Director's Decision and Direction of Election, and indefinitely postpone the election scheduled to be conducted by mail ballot in this matter because it chose not to be represented by counsel should be summarily rejected. The Union did choose to have a second individual make an appearance at the second day of hearing held in this matter, Mr. Phil D'Arcangelo, also from the New England Joint Board. Why it choose to have Mr. D'Arcangelo rather than an attorney also appear is known only to it, and provides no basis for setting aside the Decision and Direction of Election.

The foregoing examples are illustrative of the major factual deficiencies in the Union's appeal – as many of its allegations actually misstate facts and others attempt to bring before the Board facts which it chose not to introduce into the record of this proceeding prior to its appeal. The Union's "factual" assertions should be given no cognizance by the Board whatsoever.

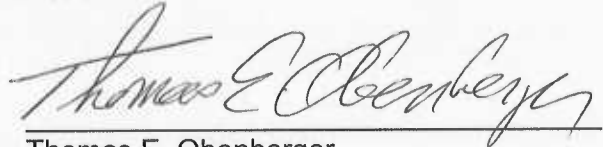
This, plus the Union's failure to establish any of the grounds for review set forth in R&R Section 102.67(c)(1)-(4) should lead to rejection of the Union's Request for Review.

Counsel for Petitioner's addressing of only the limited number of issues discussed in this Statement in Opposition should not be construed as counsel's agreement with other allegations, statements or arguments made by the Union in its Request for Review. In the event the

Request for Review is granted, counsel for the Petitioner will file a brief with the Board more thoroughly addressing all outstanding issues.

Copies of this Statement in Opposition have been simultaneously served upon all parties to this proceeding as set forth in the attached Statement of Service.

Respectfully submitted this 20th day of January, 2015.

A handwritten signature in cursive script, reading "Thomas E. Obenberger", written in black ink.

Thomas E. Obenberger  
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OPTIONAL  
First 24 characters will appear on invoice.

To Recipient's Name Melvin Drungo

Phone ( )

Company New England Joint Board Local

Address 173 A/W RWDSU/UFCW

Address 149 Mechanic Street

We cannot deliver to P.O. boxes or P.O. ZIP codes.

Dept./Floor/Suite/Room

Address Use this line for the HOLD location address or for continuation of your shipping address.

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State MA

ZIP 01453-5750

0103883458

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SPH1

Form  
ID No.

0215

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## 4 Express Package Service

\* To most locations.

NOTE: Service order has changed. Please select carefully.

Packages up to 150 lbs.  
For packages over 150 lbs., use the new  
FedEx Express Freight US Airbill.

## Next Business Day

☐ FedEx First Overnight  
Earliest next business morning delivery to select  
locations. Friday shipments will be delivered on  
Monday unless SATURDAY Delivery is selected.☒ FedEx Priority Overnight  
Next business morning.\* Friday shipments will be  
delivered on Monday unless SATURDAY Delivery  
is selected.☐ FedEx Standard Overnight  
Next business afternoon.\*  
Saturday Delivery NOT available.

## 2 or 3 Business Days

☐ FedEx 2Day A.M.  
Second business morning.\*  
Saturday Delivery NOT available.☐ FedEx 2Day  
Second business afternoon.\* Thursday shipments  
will be delivered on Monday unless SATURDAY  
Delivery is selected.☐ FedEx Express Saver  
Third business day.\*  
Saturday Delivery NOT available.

## 5 Packaging

\* Declared value limit \$500.

☒ FedEx Envelope\*☐ FedEx Pak\*☐ FedEx Box☐ FedEx Tube☐ Other

## 6 Special Handling and Delivery Signature Options

☐ SATURDAY Delivery

NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

☐ No Signature Required  
Package may be left without  
obtaining a signature for delivery.☐ Direct Signature  
Someone at recipient's address  
must sign for delivery. Fee applies.☐ Indirect Signature  
If no one is available at recipient's  
address, someone at a neighboring  
address may sign for delivery. For  
residential deliveries only. Fee applies.

## Does this shipment contain dangerous goods?

One box must be checked.

☒ No☐ Yes  
As per attached  
Shipper's Declaration.☐ Yes  
Shipper's Declaration  
not required.☐ Dry Ice  
Dry Ice, 8 UN 1845☐ Cargo Aircraft Only

## 7 Payment Bill to:

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☒ Sender  
Acct. No. in Section  
I will be billed.☐ Recipient☐ Third Party☐ Credit Card☐ Cash/CheckFedEx Acct. No.  
Credit Card No.Exp.  
Date

Total Packages

Total Weight

Total Declared Value\*

lbs. \$ .00

Your liability is limited to US\$100 unless you declare a higher value. See back for details. By using this Airbill you agree to the service conditions on the back of this Airbill and in the current FedEx Service Guide, including terms that limit our liability.

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EXHIBIT

1

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## FedEx® Tracking

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**Mon 12/22/2014 5:07 pm**  
MILWAUKEE, WI USActual delivery :  
**Tues 12/23/2014 12:08 pm**  
MA US**Delivered**

Signed for by: T.SALTER

## Travel History

Date/Time	Activity	Location
- 12/23/2014 - Tuesday		
12:08 pm	Delivered	MA
9:54 am	On FedEx vehicle for delivery	WEST BOYLSTON, MA
9:05 am	At local FedEx facility	WEST BOYLSTON, MA
7:04 am	At destination sort facility	EAST BOSTON, MA
3:49 am	Departed FedEx location	MEMPHIS, TN
- 12/22/2014 - Monday		
11:52 pm	Arrived at FedEx location	MEMPHIS, TN
5:07 pm	Picked up	MILWAUKEE, WI

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Tracking number	802703597775	Service	FedEx Priority Overnight
Delivered To	Receptionist/Front Desk	Shipper reference	059089 0066
Packaging	FedEx Envelope	Special handling section	Deliver Weekday

**EXHIBIT**

2